Supreme Court, U.S.

98-99 JUN 1 1 1998

OFFICE OF THE CLERK

No. _____

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1997

Jadair Incorporated, *Petitioner-Defendant,*

v.

Allied Colloids Inc., *Respondent-Plaintiff.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Ross R. Kinney
734 Clinton Street
Waukesha, WI 53186
414-542-5363 or 414-542-5375
414-542-5746 (FAX)
Counsel for Petitioner

llwritapp

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Tab A

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

ALLIED COLLOIDS, INCORPORATED,
Plaintiff-Appellee,

v. No. 96-2078

JADAIR, INCORPORATED,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, Senior District Judge.
(CA-96-256)

Submitted: January 28, 1998

Decided: March 16, 1998

Before WIDENER and MICHAEL, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

Ross R. Kinney, Waukesha, Wisconsin; D. Wayne Hines, Virginia Beach, Virginia for Appellant. Stephen E. Story, Megan e. Burns, KAUFMAN & CANOLES, P.C., Norfolk, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Jadair, Inc., appeals from the district court's order granting a default judgment in favor of Allied Colloids, Inc., in this diversity action. For the reasons that follow, we affirm. Allied Colloids, a New York corporation, filed suit against Jadair, a Wisconsin corporation, in March 1996, alleging nonpayment for products sold to Jadair. Jadair's sole owner and president, David Schmutzler, filed an answer on behalf of the corporation. By order entered April 4, 1996, the district court rejected Schmutzler's answer on the grounds that "a corporation may not respond except through duly authorized counsel." The order further stated that

"[u]nless [Jadair] files a proper response, it will be found in default."

Jadair then filed a second answer signed by Ross R. Kinney, an attorney licensed to practice in Wisconsin. Kinney subsequently filed a motion requesting that the district court authorize him to appear before it for purposes of representing Jadair. By order entered May 17, 1996, the district court denied Kinney's motion, and, in a separate order, granted Jadair an extension of time, until June 1, 1996, to associate local counsel and file a proper response.* Jadair failed to comply with the district court's order, however. On July 8, 1996, the district court entered default judgment in favor of

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*Local Rule 6(F) provides, in part, that "[a]ny counsel presenting papers, suits or pleadings for filing, or making an appearance, must be members of the bar of this Court, or must have counsel who are members of the bar of this Court to join in the pleading by endorsement." See E.D. Va. Loc. R. 6(F). Kinney is not licensed to practice before the Supreme Court of Virginia and, therefore, is ineligible for admission to practice before the district court. See E.D. Va. Loc. R. 6(A).

Allied Colloids. Jadair appeals.

We review the district court's award of default judgment for abuse of discretion. See Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp., 843 F.2d 808, 810 (4th Cir. 1988). Jadair first claims that neither the Federal Rules of Civil Procedure nor Title 28, United States Code, expressly require that a corporation's answer be filed by an attorney. However, almost every court to address this issue has held that a corporation may not appear pro se but must be represented only by duly licensed counsel. See Rowland v. California Men's Colony, 506 U.S. 194, 202 (1993) ("It has been the law for the better part of two centuries...that a corporation may appear in the federal courts only through licensed counsel." (citations omitted)).

Nor do we find merit in Jadair's second contention that requiring it to associate local counsel violates the Privileges and Immunities Clause and its rights to due process and equal protection. Cf. Martin v. Walton, 368 U.S. 25, 26 (1961); Asbury Hosp. v. Cass County, 326 U.S. 207, 210-11 (corporations are not citizens protected by Privileges and Immunities Clauses); Goldfarb v. Supreme Court of Virginia, 766 F.2d 859 (4th Cir. 1985) (similar rule was

rational and did not violate due process). Accordingly, we find that the district court did not abuse its discretion in entering default judgment in favor of Allied Colloids. Therefore, we affirm. We dispense with oral argument because the facts and legal contentions are adequately represented in the materials before the court and argument would not aid the decision process.

AFFIRMED

Tab B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

ALLIED COLLOIDS, INC.

Plaintiff,

v. Action No. 2:96cv256

JADAIR, INC.,

Defendant.

ORDER

This matter comes before the Court upon application of Ross R. Kinney ("Kinney") to be admitted to practice before this Court. For the following reasons, the Court **DENIES** Kinney's application.

On March 11, 1996, the plaintiff, Allied Colloids, Inc. ("Allied"), a New

York corporation, filed suit in this Court against the defendant, Jadair, Inc. ("Jadair"), a Wisconsin corporation, alleging that Jadair was indebted to Allied for various goods sold to Jadair on open account. David Schmutzler ("Schmutzler"), Jadair's President and sole owner, attempted to file an answer on behalf of Jadair. Because a corporation cannot answer a complaint filed against it except through duly authorized counsel, this Court returned the answer filed by Schmutzler on April 4, 1996. On April 9, 1996 Kinney attempted to file Jadair's answer to Allied's complaint. The Clerk of this Court filed the answer "subject to defect" because Kinney is not admitted to

practice in the United States District Court for the Eastern District of Virginia.

By his present application, Kinney seeks admission to practice before this Court. Kinney does not reside in this area and he does not know any attorneys in this area. Kinney, therefore, requests in his application for this Court to waive the requirements that local counsel introduce Kinney to the Court and that the admission take place in open court. Kinney also notes for the Court the financial inconvenience that he would endure if required to travel to this district merely for the purpose of admission.

Even if the Court could make exception for Kinney based on the above reasons, Kinney is not licensed to practice before the Supreme Court of Virginia. Kinney, therefore, is ineligible for admission to practice before this Court. See Local Rule 6(A). Accordingly, the Court **DENIES** Kinney's application for admission.

Although Kinney is ineligible for admission to this Court because he is a foreign attorney, he may appear before this Court on a limited basis after associating with local counsel pursuant to Local Rule 6(D). That rule provides as follows:

A practitioner from another state...may, upon motion made in open Court, be permitted to appear and conduct specific cases in association with a duly qualified member of the bar of this Court, if the rules of the federal Courts of the district in which he or she maintains an office extend a similar privilege to attorneys of this district; provided, however, that such foreign attorney in all appearances in Court shall be accompanied by his or her resident associate. Except where a party conducts his or her own case, no pleading or notice requirement to be signed by counsel shall be filed unless signed by counsel who shall have been admitted to practice in this Court, who shall have entered his or her appearance of record in the case, with the office address where notice can be served upon said attorney, and who shall have such authority that the Court can deal with the attorney alone in all matters connected with the case. Such appearance shall not be withdrawn without leave of

> the Court. Service of notice or other proceedings on such attorney shall equivalent to service on the parties for whom the attorney appeared.

Furthermore, Local Rule 6(F) provides, in part, that "[a]ny counsel presenting papers, suits or pleadings for filing, or making an appearance, must be members of the bar of this Court, or must have counsel who are members of the bar of this Court to join in the pleading by endorsement."

The Clerk is **REQUESTED** to send a copy of this Order to counsel of record, Kinney, and the defendant.

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

May 17, 1996

Tab C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

ALLIED COLLOIDS, INC.

Plaintiff,

v. Action No. 2:96cv256

JADAIR, INC.,

Defendant.

ORDER

This matter comes before the Court on a motion for default judgment by the plaintiff. For the following reasons, the Court **DENIES** the plaintiff's motion.

I.

The plaintiff, Allied Colloids, Inc. ("Allied"), a New York corporation, filed suit in this Court against the defendant,

Jadair, Inc. ("Jadair"), a Wisconsin corporation, alleging that Jadair owed Allied $61,082.51 for various goods sold to Jadair on open account. As shown by an affidavit of service of Richard P. Schoenfeldt, Deputy Sheriff in Ozaukee County, Wisconsin, Jadair's registered agent, president, and sole owner, David Schmutzler ("Schmutzler"), received a copy of the summons and complaint on March 15, 1996.

Attempting to act pro se on behalf of Jadair, Schmutzler filed an answer on March 29, 1996. Ruling that a corporation cannot answer a complaint filed against it except through a duly authorized counsel, this Court returned the answer to

Schmutzler on April 4, 1996. In this Order, the Court advised Jadair that, if prompt attention was not given to the matter, Jadair would have default judgment entered against it. Thereafter, Jadair employed the legal services of Ross R. Kinney ("Kinney"), a Wisconsin attorney.

Although not admitted to practice before this Court, Kinney attempted to file Jadair's "Second Answer" to Allied's complaint on April 9, 1996. The Clerk of this Court filed the answer "subject to defect." The Clerk also contacted Kinney by telephone, and informed him of this Court's requirement that foreign attorneys, such as Kinney, associate with local counsel.

Citing various financial hardships of his client and requesting that certain "requirements" be waived, Kinney applied for admission to this Court on April 11, 1996. Moreover, Schmutzler filed an affidavit stating that Jadair could not afford to have Kinney associate with local counsel. The Court denied Kinney's application on May 10, 1996. The Court quoted, at length, the text of the Local Rules of this Court as they pertain to foreign attorneys practicing in this District. On the same date, Allied moved for the entry of default judgment.

II.

Rule 12(a) of the Federal Rules of Civil Procedure require a defendant to

respond to a complaint within 20 days of the date of service. Rule 55 provides for the entry of summary judgment if the defendant fails to respond to the complaint within this time period. See Fed. R. Civ. P. 55(a)

The entry of default judgment is left to the sound discretion of the district court. Consolidated Masonry & Fire-proofing, Inc. v. Wagman Construction Corp., 383 F.2d 249, 251 (4th Cir. 1967), aff'g, 273 F. Supp. 693 (E.D. Va. 1966) (Lewis, J.); Papagianakis v. The Somas, 186 F.2d 257, 263 (4th Cir. 1950), cert. denied, 341 U.S. 921 (1951). When exercising its discretion, the trial court may consider a variety of factors, including

the nature of the default, the amount of damages claimed, and the presence of excusable neglect. See 6 Moore's Federal Practice ¶ 55.05[2].

The record reflects that the Court has the technical grounds upon which to enter default judgment against the defendant. Specifically, Jadair "has failed to plead or otherwise defend as provided by" the Federal Rules. Fed. R. Civ. P. 55(a). Nevertheless, Jadair's failure to plead or defend properly appears to be the result of excusable neglect which has results in technical deficiencies in Jadair's pleadings.[1]

[1]Through its president and Wisconsin counsel, Jadair has attempted to answer

Moreover, Allied has claimed damages

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the complaint filed against it on two, separate occasions. This Court rejected Jadair's first answer because its president attempted to file the answer on behalf of the corporation. Understanding that a layman would not necessarily know of such a restriction, the Court instructed Jadair to have "duly authorized counsel" draft the corporation's answer.

Heeding the Court's instruction, Jadair asked long-time retained counsel to file an answer to the complaint. The Court, however, rejected Jadair's second answer because Kinney failed to associate with local counsel. As a Wisconsin attorney, it is unlikely that Kinney would have a copy of this Court's Local Rules. Kinney therefore erroneously thought that he could gain admission to this Court merely by filling out the application. Although highly unlikely, this may be the procedure of the federal courts in Wisconsin. The Eastern District of Virginia, however, requires the use of local counsel so that foreign attorneys can turn to counsel learned in local customs and procedures. Such a requirement benefits the parties, their attorneys, and the Court by expediting pending litigation.

totaling over $60,000.00. Given Jadair's claim that it cannot even afford the limited expense of associating with local counsel, an entry of default judgment in this amount against Jadair would seem unduly burdensome at this stage of the litigation.

III.

Jadair's 20-day period in which to file its answer to Allied's complaint expired on April 4, 1996. Despite the presence of grounds for the entry of default judgment, the Court **FINDS** that Jadair, so far, has exercised good faith in its attempts to file a proper response to Allied's complaint. Accordingly, the

Court **DENIES** Allied's motion for default judgment at this time.

This Court's denial of default judgment does not relieve Jadair from complying with the Local Rules of this Court. Jadair has until June 1, 1996 to associate with local counsel, and to file a proper response to Allied's complaint. Counsel for Jadair and Jadair are ADMONISHED that failure to do so shall lead to the entry of default judgment against Jadair in the amount of $61,082.51 on June 2, 1996.

The Clerk is **REQUESTED** to send a copy of this Order to counsel of record, to Kinney, and to the defendant. Counsel for

the plaintiff also is **REQUESTED** to refile its motion for default judgment on June 2, 1996 in the event that Jadair does not comply with this Order.

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

May 20, 1996

Tab D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

ALLIED COLLOIDS, INC.,
Plaintiff,

v. 2:96cv256

JADAIR, INCORPORATED,
Defendant.

O R D E R

By Order entered April 4, 1996, the attempted answer of the defendant, Jadair, inc., was rejected and was returned to the defendant. Defendant then attempted to file its answer by a Wisconsin attorney without associating local counsel. This attempted answer was again rejected by this Court by its Order entered May 17,

1996.

By Order entered May 20, 1996, defendant, Jadair, Inc., was spared entry of a default judgment against it, and given until June 1, 1996 to associate local counsel required by the rules of this court. In this order the court reviewed the proceedings to May 20, 1996, and once more rejected temporarily the plaintiff's motion for default judgment, giving the plaintiff until June 1, 1996 to comply with the Local Rules.

On June 5, 1996, the plaintiff filed his Renewed Motion for Entry of Judgment by Default. Defendant, in reply, complains of a financial cash flow shortage which has hampered its ability to

hire and pay local counsel, failed to file a proper answer by June 1, 1996. Instead, on June 27, 1996, through its Wisconsin attorney, it complains of the rule which forbids counsel to practice in Virginia without properly qualifying.

This court has tendered several extensions of time to the defendant all to no avail.

It appearing to the Court that the Complaint in the above-captioned matter with attachments thereto, including a Statement of account, was filed on March 11, 1996; that the Summons was properly served on March 15, 1996; and that more than 20 days have elapsed without valid response, it is therefore

ADJUDGED, ORDERED and DECREED that judgment by default shall be had by and it is entered on behalf of Allied Colloids, Inc. against Jadair, Incorporated in the principal amount of $42,251.64 with prejudgment interest in the amount of $2,425.29, plus costs in the amount of $138.00, with interest on the judgment amount of $44,814.93 at the applicable legal rate from the date of this judgment.

The Clerk is directed to send copies of this Order to counsel of record and to the defendant.

United States District Judge

Norfolk, Virginia

July 8th, 1996

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Tab E

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

LOCAL RULES OF PRACTICE

Effective Date
February 1, 1996

Local Rule 6(A)(B)(C) provides:

(A) **Eligibility:** Any person who is a member of the bar in good standing in the Supreme Court of *Virginia* is eligible to practice before this Court upon admission.

(B) **Initial Appearance:** Any person who meets the requirements of the foregoing paragraph and who maintains a law office *outside of Virginia* shall set forth his or her Virginia State Bar I.D. Number on any *initial* pleading filed by such persons.

(C) **Procedure for Admission:** Every person desiring admission to practice in this Court shall file with

> the Clerk written application therefor accompanied by an endorsement by two qualified members of the *bar of this Court* stating that the applicant is of good moral character and professional reputation. ... The applicant shall thereafter be presented by a *qualified practitioner of the Court* who shall in open Court by oral motion, and upon giving assurance to the Court that he has examined the credentials of the applicant and is satisfied the applicant possesses the necessary qualifications, move for his *admission to practice*.
>
> (emphasis added)

Local Rule 6(D), **Foreign Attorneys**, requires:

> A practitioner from another state or the District of Columbia may, upon motion made in open Court, be permitted to appear and conduct specific cases *in association with* a duly qualified *member of the*

bar of this Court, if the rules of the federal Courts of the district in which he or she maintains an office extend a similar privilege to attorneys of this district; provided, however, that such foreign attorney in all appearances in Court shall be accompanied by his or her resident associate. Except where a party conducts his or her own case, no pleading or notice required to be signed by counsel shall be filed unless signed by counsel who shall have been admitted to practice in this Court, who shall have entered his or her appearance of record in this case, with the office address where notice can be served upon said attorney, and who shall have such authority that the Court can deal with the attorney alone in all matters connected with the case. Such appearances shall not be withdrawn without leave of the Court. Service of notice or other proceedings on such attorney shall be equivalent to service on the parties for whom

the attorney appeared.
(emphasis added)

Local Rule (F) requires:

> **Attorneys Filing Pleadings:** Any counsel presenting papers, suits or pleadings for filing, or making an appearnce, must be members of the bar of this Court, or must have counsel who are members of the bar of this Court to join in the pleading by endorsement. Any counsel who joins in *a pleading*, motion, or other paper filed with the Court will be held *accountable for the case* by the Court. At least one attorney of record from each law firm of record *must* personally be present at all hearings, pretrials, and trials. This obligation may *not* be avoided or delegated without leave of Court. (emphasis added)